RECENT DECISIONS.

CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWER—REFERENDUM.—A general statute gave to municipalities the right to extend their own boundaries by popular vote. *Held*, the statute was not unconstitutional as a delegation of legislative power. *People* v. *Ontario* (Cal. 1906) 84 Pac. 205. See NOTES, p. 61.

CONSTITUTIONAL LAW—HIGHWAY EASEMENTS—TELEPHONES.—An abutting landowner petitioned for injunctive relief against a telephone company which was about to place poles and wires along the margin of a country highway without compensating him. *Held*, that such poles and wires were not an additional burden. *Hobbs* v. *Long Distance Telephone Co.* (Ala. 1906) 41 So. 1003.

While originally the methods of communication were substantially those of travel, it seems that facilitation of the former has always been as important an object in the construction of highways as that of the latter. *Taylor* v. *Ry. Co.* (1898) 91 Me. 193; contra, *People* v. *Squire* (1888) 107 N. Y. 593, 604. Since all increase over the initial burden upon a highway which is incident to the changing modes of travel is generally held to be within contemplation of the original grant or taking and, therefore, constitutes no taking of property, *Eustis* v. *Ry. Co.* (1903) 183 Mass. 586, unless it substantially injure the use of abutting land, *De Geofroy* v. *Ry. Co.* (1904) 179 Mo. 698, the same should be true of burdens arising from a change in the general methods of communication even though the means used for the two purposes diverge. *Cater* v. *Tel. Co.* (1895) 60 Minn. 539; contra, *Krueger* v. *Tel. Co.* (1900) 106 Wis. 96. Rural telephones are now, at any rate, as prevalent in this country as rural electric carriers, and if properly constructed do not interfere with the use of abutting land. *Cater* v. *Tel. Co*, supra. Jurisdictions, therefore, which hold that the former impose an additional burden while the latter do not, although still in the majority, see *Frazier* v. *Tel. Co.* (Tenn. 1906) 90 S. W. 620, ignore the dual purpose of highway construction.

CONTRACTS—RESTRAINT OF TRADE—UNREASONABLE RESTRICTION OF COMPETITION IN LIMITED AREA.—There being only two first class hotels in a town, one of the proprietors agreed with his rival not to run his hotel for three years unless there was more patronage than the latter could accommodate, in which case the former was to accommodate the surplus guests at fixed charges. *Held*, the contract was unenforceable as in restraint of trade. *Clemens* v. *Meadows* (Ky. 1906) 94 S. W. 13. See NOTES, p. 50.

CRIMINAL LAW—FORMER JEOPARDY—INDICTMENT ERRONEOUSLY HELD INSUFFICIENT.—A statute provided that the dismissal of an indictment for variance shall not be a bar to a new prosecution. The trial court, erroneously believing that there was a material variance between the indictment and the proof, ordered the jury to bring in a verdict of acquittal. *Held*, that the defendant was once in jeopardy and could not be tried again. *Drake* v. *Commonwealth* (Ky. 1906) 96 S. W. 580. See NOTES, p. 52.

CRIMINAL LAW—SELF DEFENSE—DEFENDANT THE AGGRESSOR.—The defendant was on trial for murder. The court instructed the jury that if the defendant was at fault in striking the horse of deceased with his whip, and thereby brought on the difficulty, he could not avail himself

of the plea of self-defense. *Held*, that the instruction was correct. *Rose* v. *State* (Ala. 1905) 42 So. 21.

Proof of retreat as far as compatible with safety is an essential element of the plea of self-defense to an indictment for homicide, as showing the final necessity of taking deceased's life in order to save that of the defendant. 4 Bl. Com. 185; *Allen* v. *U. S.* (1896) 164 U. S. 492; *Sullivan* v. *State* (1893) 102 Ala. 135. The fact that the defendant was the first aggressor would seem to have no bearing on the question if he proved a subsequent bona fide retreat, for as soon as the one attacked used more force than necessary for self-defense he himself became the aggressor in a new assault, and the original aggressor should then have been held excused in using necessary force for self-defense, and even in killing the deceased to save his own life if he first retreated as far as he could in safety. This is the view of most courts if the defendant did not attack the deceased with malice, 3 COLUMBIA LAW REVIEW 533; Foster's Crown Law 277; *Rowe* v. *U. S.* (1896) 164 U. S. 546, and no malice was shown in the principal case. But a few jurisdictions beside Alabama hold a contrary view. See Clarke & Marshall's Law of Crimes 405, note 508. It is submitted that malice at the time of the first attack should make no difference if bona fide retreat were actually proved, but it might raise a presumption against such bona fides. On the question the authorities are, however, divided. Compare 1 Hale's C. C. 479, 480, and *Stoffer* v. *State* (1864) 15 Oh. St. 47, with 1 Hawk. C. P. 113, § 17.

CRIMINAL LAW—PENAL STATUTE—RESPONSIBILITY OF MASTER FOR UNAUTHORIZED ACTS OF AGENTS.—The defendant having been indicted for knowingly selling intoxicating liquors to a minor without the written consent of the parent or guardian, offered to prove that the sale was made by his agent contrary to his orders. *Held*, that such proof was no defense. *State* v. *Constatine* (Wash. 1906) 86 Pac. 384. See NOTES, p.59.

DOMESTIC RELATIONS—DIVORCE—CONVICTION OF CRIME—PARDON.—A statute allowed divorce for "conviction of either party for an offense involving moral turpitude and under which he or she is sentenced to imprisonment in the penetentiary for a term of two years or longer." Respondent was convicted of manslaughter and sentenced to twenty years, but was pardoned after serving five years. His wife filed a bill for divorce after pardon. *Held*, the right to divorce resulted from conviction and sentence and was not destroyed by a pardon. *Holloway* v. *Holloway* (Ga. 1906) 55 S. E. 191. See NOTES, p. 54.

DOMESTIC RELATIONS — INFANT'S CONTRACTS — INJUNCTION AGAINST BREACH.—An infant, 19 years of age, in consideration of employment by a milk company, contracted not to solicit business from the customers of the employer within three years after leaving its employ. While still an infant he left its employ and solicited business from its customers. *Held*, that an injunction would lie to restrain him from violating the agreement. *Mutual Milk & Cream Co.* v. *Prigge* (1906) 98 N. Y. Supp. 458.

The use of an acquaintance with an employer's customers will not be prevented in the absence of fraud, unless there is a contract not to use. *In re Irish* (1888) 40 Ch. D. 49. Hence, if the infant in the principal case is allowed to disaffirm his contract the plaintiff can have no relief against him, for the contract becomes void ab initio. *McCarthy* v. *Henderson* (1885) 138 Mass. 310. The only ground then, upon which the principal case can be supported is that the infant cannot disaffirm the partially executed contract. The English cases which are relied upon in the principal case uphold the doctrine that where the contract is beneficial to the infant it is binding upon him. *Evans* v. *Ware* [1892] 3 Ch. D. 502; *Fellows* v. *Wood* (1888) 59 L. T. Rep. N. S. 513. This doctrine seems to have been developed chiefly in connection with the statutes relating to employment and apprenticeship, 38 & 39 Vict. c. 90; 4 Geo. 4. c. 34. s. 3; *Wood* v. *Fenwick* (1842) 10 M. & W. 194; *Leslie* v. *Fitzpatrick* (1877) 3 Q. B. D. 229; and see *Meakin* v. *Morris* (1884) 12 Q. B. D. 352,

and therefore would appear inapplicable in a jurisdiction where such statutory regulation does not obtain, especially since it requires the serious modification of the general common law rule that an infant can disaffirm his contracts.

EQUITY — JOINDER OF PARTIES—INJUNCTIONS.—The defendants were engaged in committing independent acts of pollution of a stream, such that taken together they amounted to a nuisance, although the damage done by each was nominal. The parties were all riparian proprietors. *Held*, an injunction would be granted restraining the defendants jointly. *Warren* v. *Parkhurst* (N. Y. 1906) 78 N. E. 579. See NOTES, p. 57.

EQUITY—TRESPASS TO LAND—CONSTRUCTIVE POSSESSION.—The plaintiff had paper title to a parcel of land but was in possession of only a part of it. The defendant was trespassing on the part not in actual possession. The plaintiff sued in equity for an injunction, showing irreparable damage. *Held*, no injunction would issue. *Downing* v. *Anderson* (Ga. 1906) 55 S. E. 184.

A plaintiff must show at least prima facie title to land to obtain an injunction against trespassers. *McArthur* v. *Matthewson* (1881) 67 Ga. 134; *Hart* v. *The Mayor* (1832) 9 Wend. 571. This requirement, however, is satisfied by a bare possession. Since actual possession of a part of a tract of land together with a deed to the whole is construed as extending the seisin to the boundaries of the tract, *Prescott* v. *Nevers* (1827) 4 Mason 326, 330; *Chandler* v. *Spear* (1850) 22 Vt. 388, 404, an injunction should have been granted in the principal case where irreparable injury was shown, *Wilson* v. *Hill* (1890) 46 N. J. Eq. 367; *King* v. *Stuart* (1897) 84 Fed. 546; especially as under the Code both the title to the land and the right to an injunction might have been decided in a single suit. *Corning* v. *Troy Nail Co.* (1869) 40 N. Y. 191, 207. See 4 COLUMBIA LAW REVIEW 72. The reasoning of the dissenting opinion is in all respects sound.

EVIDENCE — ADMISSIONS OF SERVANT — RES GESTAE.—The plaintiff was injured by the defendant's steer. On the morning following the accident, a servant of the defendant who had the steer in charge told witnesses that the steer was vicious and had previously attacked people. *Held*, that the statements were inadmissible. *Harris* v. *Carstens Packing Co.* (Wash. 1906) 86 Pac. 1125.

The general rule is that the statements of a servant to be admissible against the master must be in respect to the matter within the scope of the servant's authority, in reference to the subject matter of the employment and made at the time of the transaction. Mechem, Agency §714; *Keenan* v. *M'f'g. Co.* (1887) 46 Hun 544, aff'd. 120 N. Y. 627; Wigmore, Ev. §§ 1078, 1797; 53 Am. Dec. 773 n. The servant's knowledge of the vicious propensity of an animal is generally imputed to the master, *Twigg* v. *Ryland* (1884) 62 Md. 380; *Corliss* v. *Smith* (1881) 53 Vt. 532; and the servant's knowledge where imputable to the master may be proved by the servant's statements before the accident as they are the best evidence of the state of the servant's mind,—a material fact. *Chapman* v. *Ry. Co.* (1874) 55 N. Y. 579, 584; *McDermott* v. *Ry. Co.* (1885) 87 Mo. 285; cf. *La Rose* v. *Bank* (1885) 102 Ind. 332; *The Ohio, etc., Ry. Co.* v. *Stein* (1892) 133 Ind. 243. The res gestae rule would therefore seem inapplicable and the servant's knowledge would seem equally capable of proof by his statements after the accident, but the law is contra, probably for reasons of the master's protection against unscrupulous servants. *Huntingdon R'y. Co.* v. *Decker* (1876) 82 Pa. St. 119; *The Saranac* (1904) 132 Fed. 936. See also, *Shaver* v. *Trans. Co.* (N. Y. 1883) 31 Hun 55; *Logue* v. *Link* (N. Y. 1855) 4 E. D. Smith 63.

EVIDENCE — CRIMINAL LAW — INDEPENDENT CRIME AS EVIDENCE OF QUALITY OF ACT.—The defendant on trial for burning a barn had at the instance of the owner been previously evicted by the subtenant of a

house on the same farm. He made threats to "get even" with both. The trial court admitted evidence of the previous burning of the barn, but refused to allow any evidence that it was the work of an incendiary or of defendant's connection therewith. *Held*, Hobson C. J. dissenting, the evidence of the previous burning was improperly admitted, even if shown to be of incendiary origin. *Raymond* v. *Commonwealth* (Ky. 1906) 96 S. W. 515.

The trial court should have admitted evidence of the defendant's connection with the previous burning to show that he had formed a scheme. *Kramer* v. *Commonwealth* (1878) 87 Pa. 299; *Commonwealth* v. *Robinson* (1888) 146 Mass. 571; 1 Wigmore, Ev. § 304. In the absence of such evidence the fact of the previous burning is irrelevant for this purpose. *State* v. *Freeman* (N. C. 1856) 4 Jones L. 5; 1 Wigmore, Ev. p. 398; § 354 (3). Where, however, the defendant is independently connected with the act charged, evidence of anonymous previous burnings is admissible to show that the defendant acted with intent. *R.* v. *Gray* (1866) 4 F. & F. 1102; 1 Wigmore Ev. § 303. Where he is not so connected with the principal act, the mere repetition of a series of similar previous acts, though no one of them is connected with any person, tends to show the quality of the principal act; as, for example, that it was done by a human being. *R.* v. *Bailey* (1847) 2 Cox Cr. C. 311. Proof of such previous acts has, therefore, strong probative effect in forming a link to show the defendant's connection with the principal act. *R.* v. *Bailey*, supra; *People* v. *Murphy* (1897) 135 N. Y. 450, 456. This effect is even stronger when any one of the previous acts is shown to be the result of conscious human effort. The court in the principal case, therefore, was wrong in holding proof of the previous burning, as the act of an incendiary, to be inadmissible. *State* v. *Hallock* (1897) 70 Vt. 159.

MUNICIPAL CORPORATIONS — CONTRACTS — ILLEGAL PROVISION. — A county board of supervisors required bidders for the publication of the journal of the board to file a bond illegal as tending to restrict competition among the bidders. *Held*, that mandamus would lie to compel the board to accept a bond from the lowest bidder which did not contain the illegal clause. *People ex rel. Single* v. *Edgcomb* (1906) 98 N. Y. Supp. 965.

Neither municipal corporations nor counties are liable upon contracts void for illegality or as against public policy, *People ex rel. Coughlin* v. *Gleason* (1890) 121 N. Y. 631; *State ex rel. St. Paul* v. *Ry. Co.* (1900) 80 Minn. 108; *Marsh* v. *Fulton Co.* (1870) 10 Wall. 676, nor will mandamus lie to compel the execution of such contracts. *Mabon* v. *Halsted* (1877) 39 N. J. L. 640. Yet in *Marshall and Bruce Co.* v. *Nashville* (1902) 109 Tenn. 495, a city was held liable upon a contract containing an illegal provision similar to that in the principal case, on the theory that both parties were entitled to disregard it. Although such a decision is palpably inconsistent with the general doctrine of the liability of public corporations upon illegal contracts, the principal case is distinguishable and supportable on the ground that upon the pleadings there was no evidence to show that the presence of the illegal clause had actually interfered with the freedom of the competitive bidding. It follows that since the plaintiff is not suing on the illegal contract, but seeks to compel the board to make a valid agreement with him, by accepting his bond free from the obnoxious provision, the writ of mandamus was properly granted. *People ex rel. Ry. Co.* v. *Barnard* (1888) 110 N. Y. 548.

NEGOTIABLE INSTRUMENTS—ATTORNEY'S FEES — NEGOTIABILITY—PENALTY.—A promissory note contained a provision to pay attorney's fees for collection. *Held*, the note was negotiable but the provision unenforceable as being a penalty. *Fields* v. *Fields* (Va. 1906) 54 S. E. 888.

The great variety of decisions on this point fall into four classes: first, note negotiable, stipulation valid, *Dorsey* v. *Wolff* (1892) 142 Ill. 589; second, note negotiable, stipulation invalid, *Boozer* v. *Anderson* (1883)

42 Ark. 167; third, note not negotiable, stipulation valid, *The First National Bank* v. *Larsen* (1884) 60 Wis. 206; fourth, note not negotiable, stipulation invalid. *Bullock* v. *Taylor* (1878) 39 Mich. 137, and *Altman* v. *Rittershofer* (1888) 68 Mich. 287. The view that the note is negotiable is preferable because of the liberal modern application of the rule requiring certainty in amount; for though the sum recoverable on the note by suit is uncertain, *Jones* v. *Radatz* (1880) 27 Minn. 240, the sum due at maturity is certain. *Stoneman* v. *Pyle* (1871) 35 Ind. 103. The two grounds for holding the stipulation invalid are usury and penalty. *Tinsley* v. *Horskins* (1892) 111 N. C. 340. It is not usurious, for no additional compensation is intended for the use of the money, and the obligor may pay at maturity and avoid the stipulation. *Dorsey* v. *Wolff*, supra; 2 Parsons, Bills and Notes 413. Since the ground for the prevention of penalties by Equity was that adequate compensation could be given without them, *Peachy* v. *Duke of Somerset* (1721) 1 Strange 447, and since in legal contemplation the payment of a debt with interest fully compensates the creditor, see *Lynde* v. *Thompson* (1861) 2 Allen 456, the technical rule resulted that a stipulation for the payment of a larger sum to secure the payment of a smaller one, is a penalty. *Reynolds* v. *Pitt* (1812) 19 Ves. 134, semble; *Sutton* v. *Howard* (1863) 33 Ga. 536; *Morrill* v. *Weeks* (1899) 70 N. H. 178; Pomeroy, Eq. §§ 441, 442. As its application in the principal case was purely technical, the stipulation simply compensating the creditor, it should have been relaxed and the stipulation enforced, *Bowie* v. *Hall* (1889) 69 Md. 433; *Montgomery* v. *Crossthwaite* (1890) 90 Ala. 553; contra, *Kittermaster* v. *Brossard* (1895) 105 Mich. 219; *Witherspoon* v. *Mussullman* (Ky. 1878) 14 Bush 214; see note, 55 Am. St. Rep. 438,—as has been done in other similar cases, note, 91 Am. St. Rep. 584; *Pass* v. *Shine* (1893) 113 N. C. 284. The N. Y. Negotiable Instruments Law, while declaring that such a note is negotiable, § 21, is silent as to the validity of such a stipulation.

NEGOTIABLE INSTRUMENTS — NOTES OF CORPORATION — DIRECTOR AS PAYEE—NOTICE.—A corporation, by a resolution of its board of directors authorized the issuance of a note to one of its directors. The note was drawn by its president and treasurer but no consideration was given for it. *Held*, that the fact that the payee of the note was a director did not put a purchaser on inquiry concerning the circumstances under which the note was issued. *Orr* v. *South Amboy Terra Cotta Co.* (1906) 98 N. Y. Supp. 1026.

A bona fide holder of commercial paper must receive it in the usual course of business. *Claflin* v. *Bank* (1862) 25 N. Y. 293. Since an agent acting for his own benefit and not for that of his principal is obviously not acting in the usual course of business, a note of a corporation payable to an officer places a purchaser on inquiry as to such officer's authority. *Randall* v. *R. I. Lumber Co.* (1898) 20 R. I. 625. This doctrine does not apply to a director, for the director is not an agent of the corporation. But even if he were, the principal case would be correct, for a resolution of authorization renders inquiry by a purchaser from an officer unnecessary, even though the officer has paid no consideration. *Wilson* v. *Ry. Co.* (1890) 120 N. Y. 145.

PLEADING AND PRACTICE—CONTEMPT — CIVIL — MANDATE OF COMMITMENT.—A witness failing to obey an order from a county judge to appear as a witness in supplementary proceedings before a referee, he was adjudged in contempt by a mandate reciting simply his failure to appear "on Aug. 8th, 1900, at ten o'clock in the forenoon, or at the time or times to which such proceedings were adjourned." *Held*, as the mandate did not set forth "the particular circumstances of his offence" it was insufficient to authorize an arrest under it. *Matter of Depue* (1906) 185 N. Y. 60.

The alleged contempt was punished by a fine for the benefit of the plaintiff and it was treated as a civil contempt throughout by the court. See *People* v. *Court* (1886) 101 N. Y. 245. The Court, therefore, applied

the same rule as to a full statement of facts in the mandate of commitment for a civil contempt, upon which the Code is silent, as required by the Code and previous cases for criminal contempt. *Matter of Barnes* (1895) 147 N. Y. 290; Code of Civ. Proc. § 11.

PUBLIC SERVICE COMPANY—CARRIERS—LIMITATION OF LIABILITY BY EXPRESS CONTRACT—PROOF.—The plaintiff shipped horses to a point beyond the terminus of defendant's line. A contract of shipment, signed by plaintiff, expressly limited defendant's liability to its own line. *Held*, the burden of proof was upon defendant to show that plaintiff assented to the limitation, and that this burden was not met, as a matter of law, by proof of the signed contract. *Wabash Ry. Co.* v. *Thomas* (Ill. 1906) 78 N. E. 777.

In Illinois a carrier undertaking transportation to an extra-terminal destination assumes a carrier's common law liability for the entire route. *Ill. etc. Ry. Co.* v. *Frankenberg* (1870) 54 Ill. 88, 97. While a carrier may, in most states, limit its common law liability by express contract which may be contained in a bill of lading, *Ry. Co.* v. *Lockwood* (1873) 17 Wall. 357; *Ill. etc. Ry. Co.* v. *Carter* (1897) 165 Ill. 570, it is sometimes held that the burden is on the carrier to prove the shipper's assent, i. e., that there is a contract. *Chicago etc. Ry. Co.* v. *Calumet Stock Farm* (1901) 194 Ill. 9. But that one who, in the absence of fraud, signs his name to a written agreement is deemed as a matter of law to assent thereto is fundamental in contract law, *Rice* v. *The Co.* (1848) 2 Cush. 80; *Breese* v. *U. S. Tel. Co.* (1871) 48 N. Y. 132, and to hold a carrier to any greater degree of diligence in order to the effectual securing of the shipper's assent is to hold not only that that burden is upon the carrier but that it cannot be met by satisfying a well-established contract rule. *N. Y. etc. Ry. Co.* v. *Seiberling Co.* (1894) 8 Ohio Cir. Ct. 593.

PUBLIC SERVICE COMPANIES—STREET SURFACE RAILWAYS—TRANSFERS—PENALTY.—The plaintiff sued for the recovery of a penalty under § 104 of N. Y. R. R. Law, which provided that surface railroads operating intersecting lines should issue free transfers entitling passengers to a continuous trip to any point on such line under penalty to the aggrieved passenger for each refusal. The transfer was denied the plaintiff on the ground that he failed to comply with a regulation of the company, that transfers would be given only if demanded on the payment of fare. Section 39 of the R. R. Law provided the same penalty as § 104 for any overcharge by any railroad, except where the overcharge was due to inadvertence or mistake not amounting to gross negligence. *Held*, that as the two sections should be read together, a railroad company which provided its conductors with transfers was not liable for the penalty. *Schwartzman* v. *Ry. Co.* (1906) 98 N. Y. Supp. 941.

The reasoning of the court is that the failure to issue a transfer to the plaintiff was due to the inadvertence or neglect of the conductor. This reasoning avoids the whole point of the case. The action of the conductor was based on the regulation of the company. If that regulation is reasonable the defendant is not liable. If it is unreasonable, and therefore void, the refusal would be due to the "gross negligence" of the defendant under § 39. This point has been decided in *Levine* v. *Ry. Co.* (1906) 99 N. Y. Supp. 422, in which case the defendant was held liable on the ground that such a stipulation was unreasonable.

REAL PROPERTY—CONSTRUCTIVE ADVERSE POSSESSION—INTERLAPPING CLAIMS.—On a tract of land of which the owner was not in possession, the plaintiff claimed title to 100 acres by deed and the defendant to 160 acres by deed, although both actually occupied only a part of the land claimed. Each party's adverse possession had ripened into title under statutes of limitation. But their constructive possessions overlapped. On a suit for trespass on the tract thus thrown into dispute, the defendant justified under his constructive possession. *Held*, for the defendant, on the ground that "the title that one acquired against the true owner

to the part he was not in actual possession of was absolutely destroyed by the same character of title acquired against the other. So, whatever may have been the rights of either party against the real owner, as between themselves neither acquired title to any of the land not in his actual possession." *Morris* v. *Jacks* (Tex. 1906) 96 S. W. 637.

This novel doctrine could only apply in the hardly conceivable event of both instituting actual, and attempting to institute constructive, possession at the same time; on the ground that neither could then claim the right of one in possession who is an owner or prior possessor to have his (the holder's) constructive possession render void any other than an actual adverse possession. The statement by the court that the evidence showed that "the possession and adverse claim of the defendant were prior to that of the plaintiff" would justify the result reached; but the reasoning of the court is unsupportable. See 6 COLUMBIA LAW REVIEW 582; see also, supra, p. 65.

REAL PROPERTY—HIGHWAYS — TRACTION ENGINES.—The defendant's traction engine, weighing ten tons, injured a water main owned by the plaintiffs, the highway authorities. The engine was considerably heavier than those commonly used in the neighborhood, but no negligence was imputable to the defendant in its construction or use. The plaintiffs' water-pipes were laid under the street thirty years before at a depth of twenty inches, which depth was found still sufficient for ordinary traffic. Admitting the duty of the highway authorities to keep the road up to date, the court found them to be under no duty to provide for traffic such as the defendant's engine, and he was *held* liable for the damage caused. *Chichester Corporation* v. *Foster* (1906) 75 K. B. D. 33. See NOTES, p. 55.

REAL PROPERTY—INTERPRETATION OF DEEDS—BOUNDARIES ON HIGHWAYS EXTENDING ALONG WATER FRONT.—The defendant owned an island in a navigable river which he laid out into lots fronting on a street which ran entirely around the island at the water's edge. He sold these lots for summer cottages. A lot was conveyed with reference to a map without mentioning the street. *Held*, that the grantee took title to the fee of the street opposite his lot to the water's edge, including riparian rights. *Johnson* v. *Grenell* (1906) 98 N. Y. Supp. 629.

Although a street adjacent to the premises conveyed, which is entirely on the vendor's land, ordinarily passes to the vendee subject to the public easement, *Haberman* v. *Baker* (1891) 128 N. Y. 253; *In re Robbins* (1885) 34 Minn. 99; yet, if the further half is valuable to the vendor, there is said to be a presumption that he retains title to that half. *Banks* v. *Ogden* (1864) 2 Wall. 57; *Brisbine* v. *Ry. Co.* (1876) 23 Minn. 114. Thus, where the further half is valuable for riparian rights, the grantor will retain title unless this presumption is overcome. *Wait* v. *May* (1892) 48 Minn. 453. The court held that in the principal case the circumstances were such as to rebut this presumption. See 6 COLUMBIA LAW REVIEW 536.

SALES — CONDITIONAL — BONA FIDE PURCHASERS FROM VENDEE. — Cattle were sold and delivered by the plaintiff, under an agreement that title should remain in him until payment. Four years thereafter, no payment having been made, the vendee, the cattle being still in his possession, mortgaged them to a third party who had no notice of the facts, in whose behalf the sheriff subsequently levied upon the cattle in execution of the mortgage. The plaintiff sued the sheriff in replevin. *Held*, that though this was a conditional sale, the right of the plaintiff had been lost by unreasonable delay, as against a bona fide purchaser. *Townsend* v. *Melvin* (Del. 1905) 63 Atl. 330.

Although the validity of reservation of title by the vendor when goods are in possession of the vendee under a conditional sale has been admitted in Delaware, *Watertown S. E. Co.* v. *Davis* (1877) 5 Houst. 192; yet the doctrine had met with opposition, *Mears* v. *Waples* (1869) 4 Houst. 62, 79; and was later limited as a "right which must be exercised

within a reasonable time," *Mathews* v. *Smith* (1887) 8 Houst. 22, followed in the principal case. The doctrine of estoppel would here seem to have received an extreme application. In New York there is a line of decisions holding that in case of a conditional sale title so passes to the vendee that he can give good title to a bona fide purchaser. *Smith* v. *Lynes* (1851) 5 N. Y. 41; *Wait* v. *Green* (1867) 36 N. Y. 556. But these cases, it has been said, *Harkness* v. *Russell* (1886) 118 U. S. 663, 674, "were substantially overruled" by *Ballard* v. *Burgett* (1869) 40 N. Y. 314, though the court took pains not to do so expressly. However, both lines have had a later following, *Austin* v. *Dye* (1871) 46 N. Y. 500; *Comer* v. *Cunningham* (1879) 77 N. Y. 391, and both are cited by text books and digests as law. The New York law, then, cannot be said to be perfectly clear on this point. See 24 Albany L. J. 363.

SURETYSHIP—BOND TO OPEN DEFAULT JUDGMENT—EFFECT OF AMENDING COMPLAINT.—The defendant became surety in a suit for specific performance, for the compliance by the principal with any decree rendered upon the opening of a default judgment. After answer the plaintiff was allowed to amend his complaint so as to demand a money judgment at law. *Held*, the surety was not discharged. *Doon* v. *Amer. Surety Co.* (1905) 97 N. Y. Supp. 270.

An appeal bond is a normal contract, Brandt's Suretyship & Guaranty § 4, 511, whose object is, in case of affirmance, to assure the performance of any judgment rendered in that action, *Cowan* v. *Cowan* (1893) 19 Colo. 315, and any material alteration in the terms will release the surety. Brandt's Suretyship & Guaranty § 416. Although authorities differ widely as to what constitutes material alteration, *Cranor* v. *Reardon* (1889) 39 Mo. App. 306; *Hutchinson* v. *Grant* (1886) 40 Hun 207; *Thomas* v. *Cole* (Tenn. 1873) 10 Heisk. 411; *Sherry* v. *State Bank* (1855) 6 Ind. 397, it is clear that there is nothing in the nature of appeal bonds to take them out of the general rule of contracts that the intention expressed or gathered from surrounding circumstances should govern. *People* v. *Backus* (1889) 117 N. Y. 196. These principles apply to the bond in the principal case which is similar in all essentials to an appeal bond. The question, therefore, is what did the parties to the bond intend and not what the law would allow the parties to the suit to do individually. It would seem that a change from an equitable action in which the original judgment was rendered to a legal action for money paid was not intended. There is, however, some authority for the rule that the parties intend what the law allows. *People* v. *Vilas* (1867) 36 N. Y. 459; *Exeter Bank* v. *Rogers* (1834) 7 N. H. 21.

SURETYSHIP—DISCHARGE OF SURETY—FAILURE TO SET OFF BANK DEPOSIT.—A surety defended a suit on a note on the ground that he was discharged by the failure of the plaintiff bank to set off the amount of the note on its maturity against the general deposit account of the maker with it, which was sufficient to pay the note. *Held*, the defendant was not discharged. *Davenport* v. *State Banking Co.* (Ga. 1906) 54 S. E. 977.

A surety has an equitable right to be subrogated, on paying the debt, to all legal liens or securities held by the creditor, *Murray* v. *Catlett* (Ia. 1853) 4 Greene 108, even though the surety knew nothing of the collateral security when he contracted. *Mayhew* v. *Crickett* (1818) 2 Swanst. 185. This right of subrogation is protected by the rule that the surety is discharged by an act of the creditor which impairs such security. *Curan* v. *Colbert* (1847) 3 Ga. 239. But, in this connection, the creditor's implied duty to protect the surety's rights is limited to the protection of his rights of subrogation, and therefore the surety cannot claim a discharge by reason of the creditor's giving up a security to which the surety would not be entitled to be subrogated on payment. *Hollingsworth* v. *Tanner* (1871) 44 Ga. 11; *Lumsden* v. *Leonard* (1875) 55 Ga. 374; *Echols* v. *Head* (1881) 68 Ga. 152; contra, *German Nat. Bank* v. *Foreman* (1890) 138 Pa. St. 474; *Pursifull* v. *Pineville Banking Co.* (1895) 97 Ky. 154. Since in the principal case the bank impaired no lien to which the surety

could claim subrogation, *Nat. Mahaiwe Bank* v. *Peck* (1879) 127 Mass. 298, the conclusion of the court is sound. *Second Nat. Bank* v. *Hill* (1881) 76 Ind. 223; *Bank* v. *Booze* (1898) 75 Mo. App. 189. See Ames Cases on Suretyship, p. 220, n.

TORTS — CARRIERS — STATUTORY DUTY TO PUBLIC — RIGHT OF EMPLOYEE TO RELY ON ITS OBSERVANCE.—The plaintiff's intestate was working on the defendant's tracks near a public crossing. He was killed by a train which did not blow its whistle. A statute required the whistle to be blown on approaching crossings. To establish negligence the plaintiff offered evidence of the defendant's invariable custom of blowing its whistle in compliance with the statute. *Held*, the evidence was inadmissible since the statutory duty was owing not to the deceased but to the public. *Norfolk etc. Ry. Co.* v. *Gesswine* (1906) 144 Fed. 56.

If the observance of a duty owing to one constitutes a method of conducting a business upon which another has a right to rely, that other if injured by the non-observance of the duty should recover. *Iltis* v. *Ry. Co.* (1889) 40 Minn. 273. Thus a mere licensee has this right of reliance and can recover if injured by a change in the condition of land or the method of conducting a business. *No. Pac. Ry. Co.* v. *Krohne* (1898) 86 Fed. 230; *Woolwine's Adm'r* v. *Ry. Co.* (1892) 36 W. Va. 329, 333; *Heaven* v. *Pender* (1883) L. R. 11 Q. B. D. 503, 512; cf. *Hartz* v. *Ry. Co.* (1870) 42 N. Y. 468. Similarly an employee who only assumes the risks ordinarily incident to the business, *Smith* v. *Baker* [1891] A. C. 325; Burdick, Torts 83, should recover, *Schultz* v. *Ry. Co.* (1878) 44 Wis. 638, on the ground of failure of the master to warn the servant of this danger. Burdick, Torts 167. Most of the cases containing contrary statements involve contributory negligence. *Wheelwright* v. *Ry. Co.* (1883) 135 Mass. 225; *Morris* v. *Ry. Co.* (1903) 184 Mass. 368.

TORTS—NEGLIGENCE—WATER COMPANIES.—A waterworks company under contract with a city to furnish water for the extinguishment of fires, negligently failed to supply the contract pressure, whereby the property of the plaintiff, a taxpayer, was destroyed. *Held*, the company was liable in tort to the plaintiff. *Mugge* v. *Tampa Waterworks Co.* (Fla. 1906) 42 So. 81.

No jurisdictions except North Carolina, *Fisher* v. *Greensboro Water Supply Co.* (1901) 128 N. C. 375, Kentucky, *Graves etc. Co.* v. *Ligon* (1902) 112 Ky. 775, United States, *Guardian etc. Co.* v. *Greensboro etc. Co.* (1906) 200 U. S. 57, and possibly New York, see *Pond* v. *New Rochelle Water Co.* (1906) 183 N. Y. 330, s. c. 6 COLUMBIA LAW REVIEW 404, but see *Wainwright etc.* v. *Queens etc. Co.* (1894) 78 Hun 146, allow a recovery under the facts of the principal case, either upon the theory of a beneficiary under the contract or a negligent breach of duty, on the ground that there is no privity between the plaintiff and defendant. *Britton* v. *Green Bay etc. Co.* (1892) 81 Wis. 48, s. c. 29 Am. St. Rep. 856; *Ukiah City* v. *Ukiah etc. Co.* (1904) 142 Cal. 173; *Nichol* v. *Huntington Water Co.* (1903) 53 W. Va. 348. This reason confuses the true basis of the liability in an action ex delicto, which is a duty arising from the relations of the parties. The contract is simply a means of establishing this relation, and while it may limit the extent of this duty to a certain degree, 2 Jaggard, Torts 897; *Hart* v. *Ry. Co.* (1884) 112 U. S. 331, it cannot entirely abrogate the obligations which the law imposes from considerations of policy as a result of these relations. Since, therefore, a water-works company is engaged in a public calling, *Tampa Waterworks Co.* v. *Tampa* (1905) 199 U. S. 241, Beale & Wyman, Railroad Rate Regulation § 57, the minority view as followed in the principal case is the better, unless the duty is owed to the public as an aggregate. On the analogy to a common carrier and the fact that the city sustains no damage and hence only a nominal breach of contract, it seems preferable to consider this duty as one due to the taxpayers individually as members of the public. See note, 29 Am. St. Rep. 863.

TRADE-MARKS AND NAMES—GEOGRAPHICAL NAME — IDENTIFICATION WITH BUILDING AND BUSINESS.—A hotel situated in "Metuchen" borough had become well known under the name "Metuchen Inn." No sign had ever been displayed on the premises. Its proprietor, the plaintiff, upon the expiration of his lease moved his business to another building to which he attached the sign, "Metuchen Inn." Subsequently the defendants opened a hotel in the old building using a sign "Metuchen Inn." The plaintiff sued to enjoin the use of the name "Metuchen Inn." *Held*, an injunction would be granted only against using the sign. *Busch* v. *Gross* (N. J. 1906) 64 Atl. 754.

A geographical name will be protected if the public are deceived. 6 COLUMBIA LAW REV. 349. This rule is applied in the principal case to an interesting state of facts. The name was found to have become identified with both the building and the business. Under such circumstances the occupant on removal should not lose the right to use the name unless he has sold the business, see *Hudson* v. *Osborne* (1869) 39 L. J. Ch. N. S. 79, although he cannot prevent its use to designate the old building. Hopkins, Unfair Trade 126, 127; *Atlantic Milling Co.* v. *Robinson* (1884) 20 Fed. 218; *Armstrong* v. *Kleinhans* (1884) 82 Ky. 303. Therefore any use of the name which was not the usual mode of designating the building was properly enjoined if the public were deceived into thinking that the plaintiff was there conducting his business.

WATERS AND WATER COURSES—APPROPRIATION—INJUNCTION.—In a suit by a prior appropriator to enjoin the defendant higher up from diverting the water of a stream the answer alleged that certain named persons appropriating water at points intermediate to the plaintiff and defendant and subsequent in time to both were diverting more water than the plaintiff claimed. *Held*, such an allegation was irrelevant. *Miller & Lux* v. *Rickey* (1906) 146 Fed. 574.

In Nevada where the principal case arose the rights of a prior appropriator are measured by his prior use, and a subsequent appropriator of the surplus acquires a right as absolute and free from any right of interference by others as the rights of those before him are secure from any interference by him. *Proctor* v. *Jennings* (1870) 6 Nev. 83, 88. It would seem, however, that when the rights of the first appropriator have been interfered with he has a prima facie case against any subsequent appropriator higher up, *Lakeside Ditch Co.* v. *Crane* (1889) 80 Cal. 181, or he may join them all as defendants. *Hillman* v. *Newington*, (1880) 57 Cal. 56. A single defendant however should be allowed to join other appropriators as parties defendant, where necessary to a complete determination of the rights to all the waters of the stream, and an allegation that the injury was caused by such subsequent appropriators would then be material to secure hostile issues. *Lakeside Ditch Co.* v. *Crane*, supra; *Nevada Ditch Co.* v. *Bennett* (1896) 30 Ore. 59. In the principal case no such attempt being made, the allegation was rightly excluded.

WATERS AND WATERCOURSES—STATE CONTROL OF NON-NAVIGABLE WATERS.—The defendant was about to transport water pumped out of the Passaic river in New Jersey into New York. This was prohibited by a Statute of New Jersey. The defendant contended the statute was unconstitutional as violating property rights and as being a regulation of interstate commerce. The lower court held the statute valid on the ground that the state was a riparian owner since it owned the bed of the river where it reached tide water, and as such entitled to prevent the taking of water from the stream for commercial purposes. The upper court affirmed this decision on the additional grounds that the necessary corporate power to so transmit water out of the state, if ever granted, was repealed before acted upon; that riparian rights did not include a right to so transmit; and that the state could prevent such exportation under the police power as it could the exportation of game. *McCarter, Atty.-Gen.* v. *Hudson County Water Co.* (N. J. 1906) Court of Errors and Appeals, November Term.

For a treatment of this subject, see the comment on the case in the lower court in 6 COLUMBIA LAW REVIEW 113, contending for the validity of the statute as a proper exercise of the police power.

WILLS—CONDITIONAL LIMITATIONS—CONSTRUCTION.—A will left all the testator's property to his son John, his heirs and assigns, except that in the event of John's "death without heirs by his present wife, then she, the present wife of said John, shall have the use of the property hereby devised to John during her life or so long as she remains his widow, and on her decease or remarriage then said property" to go to the children of the testator's daughter and other son, share and share alike. John, after aliening his fee to the defendants, outlived his wife and died childless. The plaintiffs, the children of the testator's daughter, brought an action of partition. The defendant demurred. *Held*, the demurrer should be sustained. *Mull* v. *Masten* (1906) 98 N. Y. Supp. 746.

The plaintiffs claimed that John's fee passed to them on his death without leaving issue by the mentioned wife; but the court argued that the fee would pass to them only on the concurrence of two conditions, namely: not only on John's death without such issue living, but also only in case the wife did not predecease him, for the plaintiffs could take, as expressed in the will, only "on her decease or remarriage," and this they clearly could not do until after John's death. The strict construction of the devesting clauses in this case illustrates the reluctance of courts to cut down a fee.

WILLS—PERPETUITIES—CONSTRUCTION OF VESTED INTERESTS.—A will provided that certain sums should be deposited in a savings bank to the credit of the executrix and the interest paid to the plaintiff until a certain time, when the principal should go to other legatees; certain bonds, also, were bequeathed to another legatee, to be delivered to her upon reaching her majority and if she did not, to go to others. *Held*, title vested in the legatees on the death of the testator and hence the will did not offend the rule against perpetuities. *In re Robert's Will* (1906) 98 N. Y. Supp. 809.

Failure of exclusive control and possession in the legatee does not necessarily suspend his absolute title, *Bliner* v. *Seymour* (1882) 88 N. Y. 469, which may only be suspended by the creation of a trust or of a future estate. *Everitt* v. *Everitt* (1864) 29 N. Y. 39. Since words of trust do not necessarily create one, *Warner* v. *Durant* (1879) 76 N. Y. 1, they will be construed a power in trust rather than an illegal trust. *Downing* v. *Marshall* (1861) 23 N. Y. 366. Although generally futurity annexed to a gift suspends the ownership, *Smith* v. *Edwards* (1882) 88 N. Y. 92, yet if intent is shown to make the gift vested and only defer payment there is no suspension, *Miller* v. *Gilbert* (1894) 144 N. Y. 68, as in the case of payment of interest to legatees who subsequently are to take the corpus of the fund, *Steinway* v. *Steinway* (1900) 163 N. Y. 183, or payment deferred to let in an intermediate estate, *Matter of Embree* (N. Y. 1896) 9 App. Div. 602, or for other benefit to the estate. *Loder* v. *Hatfield* (1877) 71 N. Y. 92. Therefore, the principal case is sound as to the bonds, but cannot be supported in regard to the fund since the legatees receiving the corpus do not take the income, nor is the income used for the benefit of the estate nor given to legatees who have an intermediate estate.